STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: LTDS CORPORATION, Complainant, vs. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-03-51

PROPOSED DECISION

(Issued October 22, 2004)

APPEARANCES:

MR. BRET A. DUBLINSKE, Attorney at Law, Dickinson, Mackaman, Tyler & Hagen, 1600 Hub Tower, 699 Walnut Street, Des Moines, Iowa 50309, appearing on behalf of LTDS Corporation.

MR. DAVID S. SATHER and MR. TIMOTHY J. GOODWIN, Attorneys at Law, Qwest Corporation, 925 High Street 9S9, Des Moines, Iowa 50309, appearing on behalf of Qwest Corporation.

MS. ALICE J. HYDE, Attorney at Law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Consumer Advocate Division of the Department of Justice.

SUMMARY

Sections 251 and 252 of the Telecommunications Act of 1996 govern interconnection between telecommunications carriers. 47 U.S.C. §§ 251,

252. Interconnection is connection of the facilities and equipment of telecommunications carriers so that customers of one carrier may call customers of another carrier. Each carrier has a duty to interconnect its facilities and equipment with those of other carriers. 47 U.S.C. § 251. Section 251 also requires carriers such as Qwest Corporation (Qwest) and LTDS Corporation (LTDS) to negotiate in good faith regarding the terms and conditions of agreements regarding interconnection with other carriers. Qwest and AT&T Communications of the Midwest, Inc. (AT&T) entered into such an interconnection agreement. As allowed by § 252(i), LTDS "opted in" to the interconnection agreement between Qwest and AT&T, and it, therefore, provides terms and conditions for interconnection between LTDS's facilities and equipment and those of Qwest.

On May 22, 2003, LTDS ordered four DS-1 dedicated transport unbundled network elements (UNEs) to run between Burlington and Davenport from Qwest. Qwest refused to fulfill the order on May 23, 2003. LTDS asserted that it is technically feasible to connect the four DS-1 UNEs into the Davenport Qwest central office (CO) as ordered, and Qwest asserted the order was incomplete.

Qwest further asserted that LTDS is not a legitimate competitive local exchange carrier (CLEC) and would not use the requested UNEs to provide telecommunications service and, therefore, Qwest was not obligated to

provide them to LTDS. LTDS asserted it holds a valid certificate from the Board and Qwest has no authority to disregard the certificate, it intended to use the requested UNEs to provide voice service, and it objected to this issue being a part of the proceeding.

Qwest further asserted that as of May 22, 2003, the Federal Communications Commission (FCC) prohibited "commingling" of UNEs with tariffed, or "finished" services, the LTDS order constituted commingling within the meaning of the prohibition and, therefore, Qwest was not required to fulfill the order. LTDS asserted that the commingling prohibition did not cover its order and Qwest violated the interconnection agreement by refusing to fulfill the order.

LTDS asserted the interconnection agreement provides for a credit of $2,500 per day for this type of violation and it is entitled to a total credit of $410,000 for the refusal to fulfill the order. Qwest asserted the provision in the interconnection agreement cited by LTDS does not apply to its refusal to fulfill the order. Qwest further asserted the interconnection agreement provided for common law contractual damage remedies, but since LTDS did not claim this type of damages or remedy, it is not entitled to any monetary recovery.

STATEMENT OF THE CASE

On October 22, 2003, LTDS filed a complaint against Qwest with the Utilities Board (Board). LTDS asserted it is a "competitive local exchange service provider," a "competitive local exchange carrier (CLEC)," a "telecommunications carrier," and a "local exchange carrier," as defined by Iowa Code § 476.96(3) (2003) and 47 U.S.C. §§ 153(26) and 153(44) of the Federal Telecommunications Act of 1996 (Telecommunications Act or TCA). LTDS further asserted it had adopted the January 14, 1997, interconnection agreement between Qwest and AT&T as modified on May 15, 1998. LTDS asserted the interconnection agreement between LTDS and Qwest (ICA) required Qwest to provide certain products and services to it. LTDS stated on May 22, 2003, it submitted a purchase order for four DS-1 dedicated transport unbundled network elements (UNEs) for the purpose of carrying voice traffic from the LTDS-Qwest facility-connected collocation in Burlington, Iowa, to the Qwest Davenport central office. LTDS further stated that at the Qwest Davenport office, these four circuits were to be interconnected to DS-1 dedicated transport facilities that LTDS leases from Iowa Network Services (INS). LTDS asserted the DS-1 facilities leased from INS are part of an OC-48 fiber facility that is directly connected into the Qwest central office to a

DSX/LGX[1], interconnection of these two sets of facilities would be technically feasible, and Qwest has never asserted otherwise. LTDS asserted the four DS-1 circuits constituted an order for an interoffice transmission path between a CLEC network component at the Burlington collocation and a CLEC network component or third-party network component in the Qwest Davenport central office. LTDS asserted that this order was allowed by the ICA and Qwest violated the ICA by refusing to provide the requested DS-1 dedicated transport UNEs. LTDS alleged it had been damaged by this refusal and was entitled to a $2,500/day credit plus waiver of any installation charges pursuant to the ICA. LTDS requested that the Board require Qwest to provide the requested DS-1 dedicated transport UNEs, provide $300,000 in credits for the period June 4 through October 4, 2003, plus $2,500/day thereafter, and grant it such additional relief or penalties against Qwest as the Board deemed lawful and supported by the evidence, including assessment of all costs of the proceeding to Qwest. LTDS filed its complaint pursuant to Iowa Code §§ 476.3(1), 476.101(8), 199 IAC 6, and the ICA.

On November 12, 2003, Qwest filed an answer in which it denied LTDS met the definition of "competitive local exchange carrier" and denied

[1] A DSX is a Digital System Cross-connect frame used for copper-based circuits. The term LGX is used synonymously for fiber-based circuits. "It is a manual bay or panel to which T-1 lines and DS1 circuit packs are wired. A DSX permits cross-connections by patch cords and plugs, i.e. by hand. A DSX panel is used in small office applications where only a few digital trunks are installed." Newton's Telecom Dictionary, 15th Edition. (Tr. 44.)

LTDS had a right pursuant to 47 U.S.C. § 252(i) to adopt the ICA. Qwest admitted that on May 22, 2003, LTDS submitted the purchase order for four DS-1 dedicated transport circuits to connect LTDS' collocation facility in Burlington to an entrance facility leased from INS in the Qwest Davenport central office, "a/k/a 'unbundled dedicated interoffice transport' circuits or 'UDITs'," but denied that LTDS' purpose for ordering the requested circuits was to carry voice traffic. Qwest admitted the entrance facility leased from INS consisted of DS-1 dedicated transport facilities carried on an OC-48 fiber facility directly into the Qwest Davenport central office to a DSX/LGX. Qwest admitted the connection of the UDIT to the entrance facility could be accomplished, absent prohibitions. Qwest admitted that on May 26, 2003, its employee denied the LTDS order on the basis that LTDS could not connect the UDIT to a finished service. Qwest also admitted that it sent LTDS a letter on July 25, 2003, denying LTDS' order because the requested UDIT "does not meet the Qwest product definition of a UDIT as described in the SGAT and PCAT . . . The ICA is an agreement for interconnection products and services and does not extend to tariff products. Therefore, the ICA language would not be applicable to the situation you describe, since your network configuration is a combination of UNE and tariff products." Qwest asserted that neither the ICA nor state nor federal law required it to provision the UDIT in the manner alleged by LTDS. Qwest further denied that credits were due

to LTDS under the provisions of the ICA and asserted the relief sought by LTDS was barred.

On November 25, 2003, the Board issued an order initiating the proceeding and assigning the case to the undersigned administrative law judge. A procedural schedule was established and a date set for hearing in an order issued December 1, 2003. At the parties' request, the proceedings were stayed so they could pursue settlement discussions. The settlement discussions were unsuccessful, and a new procedural schedule was established.

The hearing in this case was held on May 20 and 21, 2004, in the Board hearing room, 350 Maple Street, Des Moines, Iowa. LTDS was represented by its attorney, Mr. Bret Dublinske. Mr. David Magill and Ms. Stephanie Wingate testified on behalf of LTDS. Qwest was represented by its attorneys, Mr. David Sather and Mr. Timothy Goodwin. Mr. Elmer Craig Morris testified on behalf of Qwest. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) was represented by its attorney, Ms. Alice Hyde. The undersigned took official notice of the interconnection agreement between LTDS and Qwest and of the eight amendments to it that have been filed with the Board. LTDS Ex. 100–13 were admitted. Qwest Ex. 200–08 and 213 were admitted.

LTDS filed supplemental testimony of Mr. Magill and Exhibits 113 and 114 after the hearing. Qwest filed supplemental testimony of Mr. Morris and Exhibits 209, 210A, 210B, 211A, 211B, and 212. No one objected to the late-filed testimony and exhibits, and they are hereby admitted and made a part of the record in this case.

LTDS and Qwest filed post-hearing briefs on July 16, 2004. They filed reply briefs on August 6, 2004.

STIPULATED FACTS

On May 6, 2004, LTDS filed a joint statement of factual stipulations. Qwest and the Consumer Advocate concurred in the stipulations. The parties stipulated as follows:

> 1. All exhibits attached to the direct testimony of David Magill (Ex. 100–107) and the direct testimony of Elmer Craig Morris (Ex. 200–207) are admissible in this proceeding. This stipulation is as to admissibility only, and the weight and/or credibility to be assigned to each exhibit is left to the finder of fact.
>
> 2. LTDS is an Iowa Corporation with its principal place of business in Fairfield, Iowa.
>
> 3. LTDS was issued a certificate of public convenience and necessity by the Iowa Utilities Board on September 20, 1999, authorizing it to provide landline local exchange service in certain Iowa exchanges then served by GTE and US WEST n/k/a Qwest. The certificate remains in effect.
>
> 4. Qwest is a "local exchange carrier" as defined by Iowa Code § 476.95(6), as well as an "incumbent local

exchange carrier" under Section 251(h)(1) of the Telecommunications Act of 1996 ("TCA").

5. Qwest is also a "telecommunications carrier" as defined by TCA § 153(44) and a "local exchange carrier" as defined by TCA § 153(26).

6. On August 10, 1999, consistent with TCA § 252(i), LTDS adopted the interconnection agreement between Qwest and AT&T as modified on May 15, 1998. The agreement expired on May 15, 2001 and continues on a month-to-month basis. The interconnection agreement is on file with the Iowa Utilities Board as NIA-99-15, and the parties request that the ALJ and the Board take administrative notice of this agreement.

7. On May 22, 2003, LTDS submitted purchase order number ("PON") Q052203DMA for four DS-1 Dedicated Transport circuits to connect LTDS' collocation facility in Burlington to an entrance facility leased from INS in the Qwest Davenport central office (a/k/a "unbundled dedicated interoffice transport" circuits or "UDITs").[2]

On May 6, 2004, LTDS filed a Statement of Additional Facts and Issues. LTDS listed certain facts that it believed were not in dispute and should be considered as part of the proceeding. At the hearing, Qwest did not dispute some of the listed facts, and with one minor change, did not

[2] Qwest uses the term unbundled dedicated interoffice transport circuits (UDITs) to describe the four DS-1s LTDS ordered. (Tr. 165.) UDIT is a term used in Qwest's product catalog (PCAT), and is described as: "Unbundled Dedicated Interoffice Transport (UDIT) provides a transmission path between Qwest Wire Centers in the same LATA and state. UDIT is a dedicated interoffice transmission path designed to a DSX panel (or equivalent). You must have collocation in each Qwest Wire Center and have requested termination capacity through the collocation process." (Tr. 165.) LTDS prefers the term Dedicated Transport used in the ICA because it says this term is broader than the term UDIT used in the PCAT, and the ICA predates and "trumps" the PCAT and SGAT. LTDS Complaint pp. 5-6. The undersigned will use the term "four DS-1s" in this decision to describe what LTDS ordered for the sake of consistency unless a document is being quoted.

dispute paragraph eight. (Tr. 12–14.) Minor corrections were made to facts one, two, and three based on the parties' interconnection agreement. The parties agreed on the following listed facts:

> 1. Part A of the Scope of Agreement section of the Interconnection Agreement between LTDS and Qwest, which the parties have requested that the ALJ take administrative notice of, provides in part:
>
> This Agreement sets forth the terms, conditions and prices under which the ILEC agrees to provide . . . (b) certain unbundled Network Elements, . . . for the CLEC's own use or for resale to others, and for purposes of offering voice, video, or data services of any kind, including, but not limited to, local exchange services, intrastate toll services, and intrastate and interstate exchange access services.
>
> The same section goes on to provide:
>
> The Network Elements or Local Services provided pursuant to this Agreement may be connected to other Network Elements or Local Services provided by the ILEC or to any Network Elements or Local Services provided by the CLEC itself or by any other vendor.
>
> 2. Network Element, as defined in Attachment 12 of the ICA, means:
>
> [A] facility or equipment used in the provision of a telecommunications service. Network Element includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.
>
> 3. The second paragraph of Section 37 of the ICA, "Unbundled Network Elements" provides:

The ILEC will permit the CLEC to interconnect the CLEC's facilities or facilities provided by the CLEC or by third parties with each of the ILEC's unbundled Network Elements at any point designated by the CLEC that is technically feasible.

4. As provided in Attachment 3 of the ICA, Dedicated Transport is listed as an Unbundled Network Element, and is described as follows in Paragraph 9.1.1 of Attachment 3, as follows:

Dedicated Transport is an interoffice transmission path between CLEC designated locations to which the CLEC is granted exclusive use. Such locations may include the ILEC central offices or other equipment locations, the CLEC network components, other carrier network components, or customer premises.

5. The INS entrance facility at the Qwest Davenport central office consists of DS-1 dedicated transport facilities carried on an OC-48 fiber facility directly into the Qwest central office to a DSX/LGX.

6. Connection of the UDITs to the INS entrance facility is technically feasible.

[paragraph 7 is omitted as not agreed to]

8. On May 23, 2003, Qwest employee Sue Polk denied the LTDS order, giving the reason that UDIT cannot be connected to a "finished service".

[paragraph 9 is omitted as not agreed to]

10. On June 4, 2003, Qwest Service Manager Gayla Samparippa informed LTDS via e-mail that the S-UDIT alternative would not be available to LTDS because it, too, required collocation at both ends, and the INS entrance facility would not qualify.

DISCUSSION OF THE EVIDENCE AND ANALYSIS

1. Qwest's Refusal

As the parties stipulated, on May 22, 2003, LTDS submitted a purchase order to Qwest for four DS-1 dedicated transport circuits to connect LTDS' collocation facility in Burlington to an entrance facility LTDS leased from INS in the Qwest Davenport central office. (Ex. 104.) On May 23, 2003, Ms. Sue Polk, on behalf of Qwest, denied the LTDS order on the basis that LTDS could not connect the four DS-1 dedicated transport circuits to a "finished service." (LTDS Complaint, ¶ 11; Qwest Answer, ¶ 11; Statement of Additional Facts and Issues ¶ 8 as modified at Tr. 13; Tr. 46, 65.)

In its Complaint, LTDS stated that after it escalated, Qwest sales manager Desiree Salas again denied the order on May 28, 2003, giving as the reason that UDIT requires collocation at a Qwest facility at each end of the transport path. (LTDS Complaint, ¶ 12; Tr. 47.) LTDS stated Ms. Salas suggested this was due to language in the product catalog (PCAT), and further suggested that a product called S-UDIT would work. (LTDS Complaint, ¶ 12; Tr. 47.)

In its Answer, Qwest denied that Ms. Salas denied the order. (Qwest Answer, ¶ 12.) Qwest stated that Ms. Salas discussed the order with an LTDS representative and was informed that LTDS desired to connect the transport facilities with the facilities of another carrier in Davenport, which she

was later informed would have been INS. (Qwest Answer, para. 12.) On that basis, Qwest stated Ms. Salas told LTDS that the UDIT product was unavailable because, as described in the PCAT, it is designed for interconnection solely with the collocation equipment of the ordering CLEC. (Qwest Answer, para. 12; Ex. ECM-200, ECM-201.) Qwest stated that based on her understanding that LTDS wanted to connect the transport facility to INS' collocation equipment in Davenport, Ms. Salas suggested that LTDS investigate the S-UDIT product. (Qwest answer, para. 12.) Qwest stated that Ms. Salas did not learn until later that LTDS did not want to interconnect the transport facility with collocation equipment of INS, but instead to an entrance facility. (Qwest Answer, ¶ 12.)

On June 4, 2003, Qwest Service Manager Ms. Gayla Samarippa wrote an email to LTDS stating that S-UDIT would not work, as it also requires collocation at both ends of the Dedicated Transport UNE. (LTDS Complaint, ¶ 13; Qwest Answer, ¶ 13; Ex. 105; Statement of Additional Facts and Issues ¶ 10 and Tr. 14; Tr. 47.) According to Ms. Samarippa, the INS entrance facility at the Qwest Davenport central office would not qualify as a collocation. (LTDS Complaint, ¶ 13; Qwest Answer, ¶ 13, Statement of Additional Facts and Issues ¶ 10 and Tr. 14; Tr. 48.)

In a letter to LTDS dated July 21, 2003, Qwest Vice-President Mr. Wayne Spohn denied LTDS' order for the following reasons:

> My understanding of your request is that you currently have a collocation in Burlington, IA and [are] requesting a UDIT to connect the Burlington collocation with an INS private line T-1 in Davenport, IA. A key component of our discussion was what type of service is on the INS end and how would LTDS connect. After verification of the CFA you provided, Qwest believes that the INS side of the connection is an INS private line T-1.
>
> The description provided above does not meet the Qwest product definition of a UDIT as described in the SGAT and PCAT. The PCAT defines a UDIT as follows: 'UDIT provides you a single transmission path between Qwest Wire Centers in the same LATA and state. UDIT is a bandwidth specific interoffice transmission path designed to a DSX panel (or equivalent). You must have collocation in each Qwest Wire Center and have requested termination capacity through the collocation process. UDIT is distance sensitive and is for your use only. You can assign channels and transport voice or data. It is your responsibility to design from the DSX panel to the demarcation point and on to a connection in the wire center.'
>
> In our discussion you referenced section 9.1 of the ICA and your belief that this language would allow LTDS to connect a UDIT as requested. The ICA is an agreement for interconnection products and services and does not extend to tariff products. Therefore, the ICA language would not be applicable to the situation you describe, since your network configuration is a combination of UNE and tariff products. Further, Qwest is obligated to provide unbundled elements for local services. The scenario you propose is not a connection of unbundled elements and, therefore, would be considered co-mingling. In the state of Iowa Qwest is not obligated to co-mingle these services as you have requested.

(LTDS Complaint, ¶ 14 and Attachment B; Ex. 106; Qwest Answer, ¶ 14; Ex. ECM-202; Tr. 48.)

2. The Technical Issue

47 U.S.C. § 251(c)(2) and Section 37 of the parties' ICA require Qwest to provide interconnection at any "technically feasible" point. Technical feasibility does not mean simply what is practical or possible in an engineering sense. Verizon Communications, Inc. v. F.C.C., 122 S.Ct. 1646, 1685 (2002). Network reliability and security concerns are legitimate considerations when determining whether an interconnection is technically feasible, as are the ability of each carrier to retain responsibility for the management, control, and performance of its own network. Id.; *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, etc.,* CC Docket Nos. 96-98, 95-185, paragraphs 198, 203 (August 8, 1996) (First Report and Order).

At the hearing, Qwest did not dispute LTDS' Statement of Additional Facts and Issues paragraph six that connection of the four DS-1s ordered by LTDS to the INS entrance facility was technically feasible. (Tr. 13; Statement of Additional Facts and Issues ¶ 6.)

However, Qwest presented testimony of Mr. Morris that the LTDS order did not follow industry-defined provisioning standards, was incomplete, and did not specify where Qwest was supposed to terminate the DS-1s in the Davenport Qwest central office. (testimony of Mr. Morris, Tr. 205, 257-59.) He testified the order did not contain designated points of interconnection or

the specific information Qwest needed to know to make the particular interconnection. (testimony of Mr. Morris, Tr. 205.) He testified the order did not specify a collocation, which is a demarcation point that separates LTDS' equipment from Qwest's equipment. (testimony of Mr. Morris, Tr. 164, 165, 259, 293-99.) Mr. Morris testified that Qwest's product catalog (PCAT) required LTDS to have collocation in the Davenport Qwest Central Office as well as in Burlington to be able to order the "unbundled dedicated interoffice transport (UDIT)," but that LTDS did not have collocation equipment in the Davenport office. (Tr. 165.) Mr. Morris testified collocation is required to isolate LTDS' equipment from Qwest's in order to protect the security and integrity of the network, as well as to provide an economic demarcation point. (testimony of Mr. Morris, Tr. 259, 277–78, 293-97.) When asked whether it was technically feasible to connect the requested DS-1s with the INS entrance facility, Mr. Morris testified it would have been physically possible, but he had questions about technical feasibility, because the order did not specify where and how to connect the four DS-1s. (testimony of Mr. Morris, Tr. 260, 278, 293-99.)

LTDS argues that Qwest's position, largely raised at hearing and long after the order was denied, is frivolous. (LTDS Post Hearing Brief, p. 11). LTDS states that it provided a connecting facility assignment that told Qwest precisely which incoming trunk to connect and where on the Qwest DSX

frame Qwest could find the "matching" DS-1s from the INS entrance facility. (LTDS Post Hearing Brief, pp. 11–13; Tr. 269, 311-13; Ex. 104.) LTDS further argued that, if it had collocated in the Qwest central office, it would have had more equipment and more access to the office, and network security would, therefore, have been more at risk. (LTDS Post Hearing Brief, pp. 12, 13; Tr. 308-10.)

In his closing argument, Qwest's lawyer stated: "It's not really an issue that it's technically feasible to connect this service. It's not really an issue that their order had some inconsistencies in it, because we rejected the order. If the order was going to be acceptable because it wasn't commingling, we probably could have worked those things out, but the main problem in this case, and what we want you to do is enforce the federal law that governs the interconnection agreement and prohibits commingling." (Tr. 334–35.) Similarly, in its Post-Hearing Brief at page 2, Qwest stated the issues for decision were narrowed to: 1) whether the LTDS order constituted commingling prohibited by FCC orders; and 2) whether LTDS was entitled to the remedy it seeks. It therefore appears that Qwest is no longer asserting the technical concerns, and a decision regarding them is not needed.

3. The CLEC Issue

In various filings, prefiled testimony and exhibits, at hearing, and in post-hearing filings, Qwest asserted that LTDS was not a bona fide CLEC,

that LTDS would not be using the facilities for the provision of telecommunications service, but rather, for interexchange, internet-bound traffic and, therefore, that LTDS was not entitled to the four DS-1 dedicated transport UNEs it ordered. (Qwest Response to Motion for Protective Order; Testimony of Mr. Morris, Tr. 164, 172-76, 212-23; argument of counsel, Tr. 225-32; Exhibits ECM-204, ECM-205, ECM-206, ECM-209; Qwest Prehearing Brief; Qwest Statement of Disputed Issues.) Qwest argued it was not required to lease UNEs to LTDS under § 251(c)(3) of the Telecommunications Act. (Testimony of Mr. Morris, Tr. 164.)

LTDS objected to this issue being a part of the proceeding as not relevant and moved to strike all related testimony and exhibits[3]. (Tr. 223-32; LTDS Post Hearing Brief, p. 9; LTDS Reply Brief, pp. 9-10.) LTDS stated that Qwest did not deny LTDS' order in May 2003 on the basis of whether LTDS was a CLEC. (Tr. 184, 216; LTDS Post Hearing Brief, p. 9.) LTDS further stated that Qwest stipulated LTDS had a valid CLEC certificate from the Board and Qwest had no authority to disregard the certificate. (Stipulated Fact 3; Tr. 182-83; Tr. 55, 61; LTDS Post Hearing Brief, p. 9.) LTDS argued that, if Qwest's argument is based on its belief that LTDS would use the

[3] In its Post-Hearing Brief at page 9, LTDS stated its motion to strike, which was intended to narrow the issues to be litigated, is now largely moot. Qwest argued that the evidence regarding traffic between the companies was also relevant to the commingling issue and the best evidence of why commingling was bad. (Tr. 231-2.) Therefore, since commingling is a relevant issue in the case, the evidence will not be stricken from the record, but will be considered only as it may relate to the commingling issue.

ordered facilities to transport data, this was expressly permitted by the interconnection agreement. (LTDS Statement of Additional Facts, ¶ 1; Tr. 12; LTDS Post Hearing Brief, p. 9; LTDS Reply Brief, pp. 9–10; Tr. 61.) Finally, LTDS argued that any traffic imbalance was some time ago and was explained by LTDS' inability to enter the voice market, that the evidence showed LTDS had voice customers in Burlington and intended to use the ordered facilities to provide voice service, that Qwest should not be allowed to deny LTDS needed facilities to enter the voice market and then claim LTDS is not a legitimate CLEC because it has no voice traffic in Qwest territory, and that LTDS is now one of the larger voice CLECs in Iowa. (LTDS Post Hearing Brief, p. 10; Tr. 60-62.)

In its Initial Post-Hearing Brief, Qwest stated that its position on the issue appeared to be misunderstood. (Qwest Initial Post-Hearing Brief, p. 14). Qwest stated:

> Qwest did not reject LTDS' order because LTDS is not a legitimate CLEC. Qwest does not challenge the validity of LTDS' certificate of authority. If Qwest were making such a challenge, however, those challenges would properly be the subject of another proceeding.
>
> The evidence regarding LTDS' failure to provide any local telecommunications services in Burlington, however, is relevant and properly admissible in this proceeding, as further proof that Qwest's rejection of the order was proper. Again, Qwest rejected LTDS's order because the requested transport would result in commingling dedicated transport with the finished retail access service of the INS entrance facility. LTDS's failure to provide any meaningful local

> exchange services – notably in the Burlington exchange – confirms that Qwest made the right decision: that the requested transport was almost exclusively to be used for interexchange, Internet-bound traffic, thereby commingling interexchange traffic with the unbundled dedicated transport intended for local exchange service.

(Qwest Initial Post-Hearing Brief, p. 14).

Qwest did not deny the requested order on the basis that LTDS is not a legitimate CLEC or that it would not be using the ordered facilities for telecommunications services. (Qwest Initial Post-Hearing Brief, p. 14; Reply Brief, p. 2; Tr. 106-07; Tr. 184, 216; Tr. 225.) Therefore, the issue of whether LTDS is a legitimate CLEC or how it would be using the ordered facilities is not a relevant issue in this case, and the evidence regarding the issue will not be considered further, except that evidence regarding use of the facilities will be considered as part of Qwest's commingling argument.

In addition, this evidence is not "further proof that Qwest's rejection of the order was proper." Iowa Code § 476.29 gives the Board the authority to issue certificates for providing local telecommunications services, the Board has issued such a certificate to LTDS, and after review, determined not to revoke the certificate. Docket No. TCU-01-13, Final Decision and Order, issued January 9, 2002. Qwest cannot use beliefs it may hold regarding the legitimacy of LTDS' CLEC status or LTDS' intended use of requested facilities as a basis for rejection of an order.

As Mr. Magill testified on behalf of LTDS, "To allow an incumbent to ignore a Board-issued certificate and decide which entrants it feels are suitable for competing in its market would be most damaging to a competitive atmosphere." (Tr. 61.) The Board is required to further the development of competition in the telecommunications industry to the extent reasonable and lawful, and allowing Qwest to reject an order because it believed LTDS was not a legitimate CLEC or would use ordered facilities in a certain way would be anti-competitive. Iowa Code § 476.95.

When it discussed the commingling restriction, the FCC never stated that an ILEC could refuse to fill an order based on its belief that a competitor would not use the requested facilities to provide local service. Supplemental Order Clarification. Rather, it established a system of self-certification by the CLEC. Supplemental Order Clarification, ¶¶ 22, 29-31. The FCC stated that, although ILECs could conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options, it emphasized that ILECS could not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements. Supplemental Order Clarification, ¶¶ 29, 31. If Qwest wishes to challenge the legitimacy of a CLEC or its use of ordered facilities, it must do so in an action for this purpose before the Board.

4. The Commingling Issue

The commingling issue centers on the requested connection between the four DS-1s LTDS ordered and the INS entrance facility in the Davenport Qwest central office. Mr. Magill described the LTDS desired circuit layout in the Davenport Qwest central office as follows:

> From Qwest we were simply asking from our collocation there[4] to connect four T1s[5] to the Qwest DSX panel or digital cross-connect switch, whatever they terminate those four T1s in the Davenport central office downtown. That's all we wanted from Qwest.
>
> In that same panel or same switch we know that there are four T1s as part of an OC-48 facility[6] that terminates in that same location, like on probably something this size, my desk; just put those two together, probably by software. And the rest of it is all INS. So right in that DSX panel that's in the middle of the Qwest-Davenport downtown CO is where the Qwest UNEs would meet the INS entrance facility.

(Tr. 123, 124.)

Mr. Magill testified the INS entrance facility had two ends, one in the Davenport Qwest central office, and one on the eighth floor of the same building where INS had its point of presence in Davenport. (Tr. 124.) Mr. Magill testified that if LTDS were not required to collocate in the Davenport Qwest central office, the INS DS-1s it leased (that were part of the INS

---

[4] LTDS collocated with Qwest at its switch in Burlington. (Ex. 100; Tr. 40.)
[5] T1s are the same as DS-1s.
[6] The OC-48 facility is also called the INS entrance facility in the record in this case. Mr. Magill testified that INS purchased or rented the OC-48 from Qwest to connect with Qwest's Davenport central office. (Tr. 124.) LTDS leased 4 DS-1s of this OC-48 from INS. (Tr. 41, 124; Ex. 101.)

OC-48) would terminate on a DSX panel in the Davenport office, and Qwest could directly terminate the four ordered DS-1s from Burlington on that same DSX panel, cross-connecting it themselves. (Tr. 322.) Mr. Magill testified that if collocation were required, the only difference would be that there would be a second DSX panel in the Davenport office. (Tr. 325; Magill Post Hearing Testimony, p. 3; Ex. 113.)

Mr. Magill testified that once LTDS realized Qwest might not provide the ordered DS-1s, LTDS arranged for alternate dedicated transport between Burlington and Fairfield. (Tr. 50-51.) The cost of the alternate transport was approximately $50,000, plus approximately $28,000 in personnel resources, and was operational in November 2003. (Tr. 51; Magill Post Hearing Testimony, p. 5; Ex 114.) The alternate transport includes a DS3, not four DS-1s as ordered, so the costs are not exactly comparable. (Tr. 50; Ex. 114.)

Qwest witness Mr. Morris testified that LTDS wanted to connect the four DS-1s it ordered at the Davenport end to the entrance facility that another carrier, INS, had leased from Qwest. (Tr. 165.) Mr. Morris testified that LTDS could not connect the four DS-1s to the INS entrance facility because INS leased the entrance facility from Qwest as a retail offering purchased pursuant to a Qwest tariff. (Tr. 166.) Therefore, according to Mr. Morris, the INS entrance facility constituted a "finished service." (Tr. 166.) Mr. Morris testified a finished service is a tariffed product, not a UNE.

(Tr. 166.) Mr. Morris testified that connecting a UNE, such as the four DS-1s LTDS ordered, to any facility that is not a UNE is termed commingling and was prohibited by FCC orders. (Tr. 166.) He further testified that because the entrance facility to which LTDS wanted to connect the four DS-1s was a tariffed finished service, not a UNE, the FCC's rules against commingling would prohibit Qwest from provisioning the DS-1s to LTDS as LTDS requested. (Tr. 167.)

LTDS' Position

LTDS asserts that it is entitled to the four DS-1 dedicated transport UNEs it ordered and the language of the ICA covers the ordered UNEs. (LTDS Complaint; Tr. 44; LTDS Prehearing Brief, pp. 3, 4; LTDS Post Hearing Brief, pp. 2, 3). LTDS further asserts that the ICA contains a graphic to illustrate dedicated transport that precisely matches what it ordered from Qwest. (Ex. 103; Tr. 44; LTDS Post Hearing Brief, p. 2.) LTDS argues that Qwest's reason for denial of the order, that it constituted commingling, is legally incorrect and that Qwest was aware at the time that its position was incorrect. (LTDS Post Hearing Brief, p. 2; Reply Brief, p. 1-3.) LTDS argues that every authority cited by Qwest to support its position expressly limits the commingling restriction to loops and loop-transport combinations that are not at issue in this case. (LTDS Reply Brief, pp. 1-7).

The parties stipulated that Attachment 3, Section 9.1.1, of the ICA describes the Dedicated Transport UNE as follows:

> Dedicated Transport is an interoffice transmission path between CLEC designated locations to which the CLEC is granted exclusive use. Such locations may include the ILEC central offices or other equipment locations, the CLEC network components, other carrier network components, or customer premises.

LTDS asserts that this provision describes what it ordered from Qwest and grants LTDS the right to the Dedicated Transport it seeks. (Tr. 44, 45; LTDS Prehearing Brief, p. 4; LTDS Post Hearing Brief, pp. 3, 4.) LTDS further asserts that the only way Qwest can avoid liability for violating LTDS' rights under Attachment 3, Section 9.1.1, is if there is a superseding legal argument that invalidates LTDS' rights. (LTDS Post Hearing Brief, p. 4).

LTDS states the only reason Qwest denied LTDS' order was the alleged prohibition against commingling. (LTDS Post Hearing Brief, pp. 4, 5). LTDS states that Qwest has consolidated the reasons given for the denial, such as the need for collocation, the definitions in the SGAT/PCAT, and the inability to connect to a finished service, into its theory regarding commingling. (LTDS Post Hearing Brief, p. 4) LTDS further states that Qwest's witness Mr. Morris testified that "[c]onnecting a UNE such as UDIT[7] to any facility that is not a UNE is termed 'commingling.'" (Tr. 166; LTDS Post Hearing Brief, p. 5). However, LTDS asserts that the commingling restriction

is not this broad and applies only where loops are involved, and in particular, where loop-transport combinations known as Enhanced Extended Loops, or EELs are involved. (LTDS Post Hearing Brief, p. 5; Reply Brief, pp. 1-7).

LTDS argues paragraphs 717 and 720 of the First Report and Order[8] cited by Qwest are irrelevant because they are part of a section pertaining to purchasers of unbundled local switching, and LTDS has its own switch in Fairfield and was not attempting to obtain a switch from Qwest. (LTDS Reply Brief, p. 3). Furthermore, LTDS argues there is no evidence it was seeking the facilities to originate or terminate interstate traffic, discussed in paragraph 721 of the First Report and Order, so the order does not provide a foundation for Qwest's commingling theory. (LTDS Reply Brief, p. 3).

LTDS disputes Qwest's argument that applying the commingling restriction to loop-transport combinations but not transport alone is illogical and ignores the FCC's policy concerns. (LTDS Reply Brief, p. 4). LTDS argues the FCC was concerned that a new entrant serving as an interexchange carrier (IXC) could serve end use customers using only UNEs and avoid paying tolls on the end use calls. (LTDS Reply Brief, p. 4.) LTDS argues that since the IXC could only serve the end user this way if it has the

---

[7] In this case, the UDITs, or unbundled dedicated interoffice transport circuits, are the four DS-1s running from Burlington to Davenport.

[8] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carrier and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499; FCC 96-325 (Released August 8, 1996)(First Report and Order).

last mile loop to the customer's home or office, it makes perfect sense that the FCC's concern was limited to combinations where loops were involved. (LTDS Reply Brief, p. 4.)

LTDS argues that the FCC's Third Report and Order[9] also does not support Qwest's position. (LTDS Reply Brief, p. 4.) LTDS argues paragraph 483 of that order was merely a recitation of the ILECs' position in the case, and the section in which the paragraph exists is entitled "Combinations of Unbundled Loops and Transport Network Elements." (LTDS Reply Brief, p. 4.) LTDS further argues that the only relevant discussion is in paragraph 484 of the order, in which the FCC discusses the First Report and Order's conclusion that the Telecommunications Act did not permit usage restrictions on the use of UNEs. (LTDS Reply Brief, pp. 4-5.) Therefore, LTDS argues, the Third Report and Order does not provide a foundation for Qwest's commingling theory, but instead supports LTDS' position. (LTDS Reply Brief, p. 5.)

LTDS further argues that the Supplemental Order[10] provides no support to Qwest because it "allow[ed] incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a

[9] *Third Report and Order and Notice of Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, 15 FCC Rcd 3696 (Released November 5, 1999)(Third Report and Order).
[10] *In the Matter of implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98, 15 FCC RCD 1760, FCC 99-370 (Released November 24, 1999)(Supplemental Order).

substitute for special access service." Supplemental Order, ¶ 4. (LTDS Reply Brief, p. 5.)

LTDS argues that Qwest's reliance on paragraphs 4, 5, and 28 of the FCC's Supplemental Order Clarification[11] to support its view of the commingling restriction is incorrect, because those paragraphs discuss and define commingling in a way that is limited to combinations involving loops, consistent with LTDS' position. (LTDS Prehearing Brief, p. 9; LTDS Post Hearing Brief, p. 5; Reply Brief, pp. 5-6). LTDS quotes the following language from paragraph 28 to support its position:

> We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.

(LTDS Post Hearing Brief, p. 5; Reply Brief, p. 6.)

LTDS states that the network element it requested is dedicated transport between central offices without any loop, not a loop or loop-transport combination. (LTDS Prehearing Brief, p. 9.) LTDS further states that what it seeks to combine the transport with is not a "tariffed special access service." (LTDS Prehearing Brief, p. 9.) LTDS quotes the description of special access service in footnote 36 of the Supplemental Order Clarification:

---

[11] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order Clarification (June 2, 2000) (Supplemental Order Clarification)

> Special access service employs dedicated, high-capacity facilities that run directly between the end-user, usually a large business customer, and the IXC's point-of-presence.

LTDS argues it is not buying any part of the path from a tariff, and neither the DS-1s LTDS leases from INS nor the INS OC-48 entrance facility runs "directly between the end-user . . . and [an] IXC's point of presence." (LTDS Prehearing Brief, p. 9.) Therefore, LTDS states, the facilities it ordered do not fall within the definition of commingling. (LTDS Prehearing Brief, p. 9.)

LTDS further argues that, in the Supplemental Order Clarification, the FCC was concerned only with interexchange carriers (IXCs) and only about using UNEs to avoid special access. (LTDS Prehearing Brief, p. 9.) LTDS states it is not an IXC and is not seeking to use the dedicated transport it ordered for toll access services. (LTDS Prehearing Brief, p. 9.) Therefore, it states, no special access is being circumvented. (LTDS Prehearing Brief, p. 9.)

LTDS states that Qwest relies on the FCC's Triennial Review Order[12], and in particular, paragraph 579, to support its position. (LTDS Post Hearing Brief, p. 5; Reply Brief, p. 6.) LTDS states paragraph 579 eases the prior restriction on commingling, but also states:

---

[12] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03036 9 (released August 21, 2003, effective October 2, 2003) (Triennial Review Order, or TRO)

> We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the Supplemental Order Clarification and applied to stand-alone loops and EELs.

(LTDS Post Hearing Brief, p. 5; Reply, p. 6).

LTDS argues that this paragraph limits the prior restriction on commingling to combinations involving loops. (LTDS Post Hearing Brief, p. 5)

LTDS acknowledges that for the purpose of lifting the commingling restriction, later in paragraph 579, the FCC used commingling to mean the broader connection of a UNE to a wholesale service. (LTDS Post Hearing Brief, pp. 5–6). However, LTDS argues, the reason the FCC described a broader range of combinations in lifting the restrictions was that the FCC believed ILECs like Qwest had been applying the restrictions too broadly. (LTDS Post Hearing Brief, p. 6) LTDS argues that since "the ILECs had been interpreting the prohibitions too broadly, the only way to ensure that the ILECs lifted all of their erroneous restrictions was to explain that all of them were now subject to the TRO's easing of the restrictions. See TRO at ¶ 362." (LTDS Post Hearing Brief, p. 6; Tr. 59.)

LTDS argues that, between the time of the Supplemental Order Clarification and the denial of LTDS' order in this case, there were a number of decisions rejecting Qwest's interpretation of the commingling restriction.

The first decision LTDS cites is the WorldCom Order[13]. LTDS refers to paragraph 510, in which the order states: "[W]e disagree with Verizon's argument that WorldCom's language is impermissible because it allows 'commingling' of UNEs with a special access service. While the Commission's rules provide such a restriction with respect to EELs, this restriction does not apply generally to all UNEs." (LTDS Prehearing Brief, pp. 9, 10; LTDS Post Hearing Brief, p. 6; Reply Brief, p. 7).

Second, LTDS cites to the 2001 decision of a hearing commissioner of the Colorado Public Utilities Commission on Qwest's Section 271 application[14], which addressed the scope of the prohibition on commingling. (LTDS Post Hearing Brief, p. 6; Reply Brief, p. 7.) In that decision, after hearing Qwest's position and the positions of the CLECs and Commission Staff, the hearing commissioner concluded:

> The most reasonable interpretation of commingling in the *Supplemental Order Clarification* and the Commission's subsequent *Public Notice* is that commingling is forbidden between loop and loop-transport combinations and tariffed special access services.

(LTDS Post Hearing Brief, pp. 6, 7; Ex 112; Tr. 196-201.)

---

[13] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) etc.,* Memorandum Opinion and Order by the Chief, Wireline Competition Bureau, CC Docket Nos. 00-218, 00-249, and 00-251, FCC DA 02-1731 (July 17, 2002) (WorldCom Decision).
[14] *In the Matter of the Investigation Into U.S.West Communications, Inc.'s Compliance with Section 271(C) of the Telecommunications Act of 1996,* Decision No. R01-846; Docket No. 97I-198T, Colorado Public Utilities Commission (August 16, 2001) (Colorado Decision).

LTDS next cites to a 2001 decision by an administrative law judge for the Washington Utilities and Transportation Commission[15] in a review of Qwest's Section 271 application that stated:

> In accordance with current FCC policy [footnote omitted], the only UNE combinations that are prohibited from combination with other services are loops or loop-transport combinations with tariffed special access services.

(LTDS Post Hearing Brief, p. 7.)

LTDS argues that both the Colorado and Washington proceedings involved Qwest and directly rejected the same interpretation Qwest advances in this case, and both cases were decided prior to Qwest's denial of LTDS' order in May 2003. (LTDS Post Hearing Brief, p. 7; Reply Brief, p. 7.) LTDS further argues that when Qwest rejected LTDS' order, Qwest knew that its position had been rejected by these state regulators and argues that Qwest had no good faith basis to believe that any restriction on commingling extended beyond loops and loop-transport combinations. (LTDS Post Hearing Brief, p. 7; Reply Brief, p. 7).

LTDS argues that since the order was rejected there has been further confirmation that LTDS' position is correct. (LTDS Post Hearing Brief, p. 7.) LTDS states that Qwest relies in part on its unique reading of portions of the

---

[15] *In the Matter of the Investigation Into U.S.West Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996; In the Matter of U.S.West Communications Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996;* Opinion, Docket Nos. UT-003022, UT-003040,

TRO to support its position. (LTDS Post Hearing Brief, p. 7.) However, LTDS states, the TRO was reviewed by the D.C. Circuit Court of Appeals in the USTA II case[16], and that Court extensively discussed the commingling rules entirely in the context of EELs, noting that the Supplemental Order Clarification "restrict[ed] 'commingling' by CLECs of EELs and tariffed special access services used for interoffice transmission."[17] (LTDS Post Hearing Brief, p. 8; Reply Brief, p. 6.)

LTDS argues that the language of the FCC's orders and the state and federal decisions interpreting them overwhelmingly support LTDS' position: that the only restriction on commingling involved loops or loop-transport combinations. (LTDS Post Hearing Brief, p. 8; Reply Brief, p. 7.) LTDS states that, in this case, it ordered stand-alone transport with no loops and, therefore, the order did not constitute commingling of a type restricted by the FCC. (LTDS Post Hearing Brief, p. 8.) LTDS argues that Qwest knew this to be the case, denied the order using commingling as an excuse, and knowingly and willfully violated LTDS' legal rights. (LTDS Post Hearing Brief, p. 8.)

Washington Utilities and Transportation Commission Administrative Law Judge (July, 2001) (Washington Decision).

[16] United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004)(USTA II)

[17] "*See* USTA II, 359 F.3d at 590; *See also* Competitive Telecommunications Assoc. v. FCC, 309 F.3d 8, 17 (D.C. Cir. 2002) (Finding that "the Commission's anti-commingling rule, essentially, 'does not allow loop-transport combinations [taken as UNEs] to be connected to the incumbent LEC's tariffed services.'" (LTDS Post Hearing Brief, p. 8)

Qwest's Position

Qwest argues that it properly rejected LTDS's order because LTDS sought to connect a UNE to a retail service that is not a UNE, which constitutes commingling prohibited by FCC regulations[18]. (Qwest Post Hearing Brief, p. 2.) Qwest states that the ICA controls the relationship between the parties. (Qwest Post Hearing Brief, p. 4.) It further states that federal and state law provide the context under and through which the ICA should be interpreted and applied. (Qwest Post Hearing Brief, p. 4.) Qwest argues it simply applied federal law as it interpreted the provisions of the contract and denied the order. (Qwest Post Hearing Brief, p. 4.) Qwest states that the reasons given for rejection of the order, lack of collocation, no proper endpoint to connect to in Davenport, and inappropriateness of connecting a UNE to a tariffed product, consistently point to and support its conclusion that the order constituted prohibited commingling of local interconnection facilities with interexchange access facilities and traffic. (Qwest Reply Brief, p. 2.)

Qwest states, if there is a conflict between the ICA and either the SGAT or the PCAT, the ICA controls. (Qwest Post Hearing Brief, p. 4.) However, Qwest states, there is no conflict in this case. The PCAT states

[18] Although Qwest at times states that FCC rules or regulations prohibited commingling, the prohibition was contained in FCC orders rather than regulations. A definition for the term "commingling" did not appear in the regulations until October 2, 2003, after the order in this case was denied in May 2003. 47 C.F.R. § 51.5.

that collocation is required at each wire center end of an ordered dedicated transport facility. (Qwest Post Hearing Brief, pp. 3-4; Tr. 165; Ex 200.) Qwest argues this was consistent with FCC orders that prohibited commingling at the time the LTDS order was placed. (Qwest Post Hearing Brief, p. 4.) Qwest further argues, since paragraph 37 of the LTDS/Qwest ICA states that the agreement is subject to federal law, the PCAT's requirement of collocation is consistent with the ICA as interpreted consistent with the FCC orders. (Qwest Post Hearing Brief, p. 4.)

Qwest states that the prohibition on commingling had its beginnings in the FCC's First Report and Order, in which the FCC observed:

> Without further action on our part, section 251 would allow entrants to use those unbundled network facilities to provide access service to customers they win from incumbent LECs, without having to pay access charges to the incumbent LECs. This result would be consistent with the long-term outcome in a competitive market. In the short term, however, while other aspects of our regulatory regime are in the process of being reformed, such a change may have detrimental consequences.[19]

(Qwest Post Hearing Brief, p. 7.)

Qwest states that to temporarily address these concerns, the First Report and Order permitted incumbents to assess access charges for a short time.[20] (Qwest Post Hearing Brief, p. 7.) However, Qwest states, this

[19] First Report and Order, ¶ 717.
[20] First Report and Order, ¶ 720.

measure was only a temporary solution for the problem now called "commingling." (Qwest Post Hearing Brief, p. 7.)

Qwest states the issue was more permanently addressed in the FCC's Third Report and Order. (Qwest Post Hearing Brief, p. 8.) In that order, Qwest states the FCC noted the following concerns raised by incumbent carriers like Qwest:

> As discussed above, in some situations in the incumbent's network, loops and dedicated transport network elements are already combined to provide special access services for interexchange carriers. In *ex parte* filings, incumbent LECs, including BellSouth and SBC, argue that the Commission should restrict a requesting carrier from obtaining such combined facilities as unbundled network elements in order to prevent requesting carriers from by-passing existing special access services. BellSouth and SBC both argue that such a restriction is necessary to prevent interexchange carriers from benefiting from the difference between special access rates and unbundled network element prices and thus, protect the incumbent LEC's current exchange access revenue streams.[21]

Qwest argues that this precise problem is presented in this case. (Qwest Post Hearing Brief, p. 8.) Qwest argues that: "in this case, LTDS would send - and does send under the alternative transport arrangement it obtained – a significant amount of Internet-bound traffic[22] from Burlington to Fairfield, crossing exchange and LATA boundaries, that never returns to terminate in Burlington, but instead continues on to the Internet. As such, the

[21] Third Report and Order, ¶ 483 (footnotes omitted).
[22] Qwest argues that even today, almost all of LTDS' traffic is Internet-bound traffic originated by Qwest end users, and cited Tr. 268 and Exhibits 206 and 209 in support.

transport LTDS ordered would have resulted in commingling network elements intended for local interconnection traffic for the purpose of transporting interexchange traffic." (Qwest Post Hearing Brief, p. 8.)

Qwest further states that the FCC's resolution of the issues seemed unclear in the Third Report and Order, so the FCC issued a Supplemental Order, which modified the conclusions of the Third Report and Order to allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service.[23] (Qwest Post Hearing Brief, p. 9.)

Qwest states the FCC next issued a Supplemental Order Clarification in which the FCC reviewed the history of the problems that could be presented by IXCs and CLECs purchasing unbundled network elements in order to avoid access charges. (Qwest Post Hearing Brief, p. 9.) Qwest quoted paragraphs four and five of that order:

> 4. A series of events since the Commission issued its *Local Competition First Report and Order,* culminating in the Supreme Court's decision in *AT&T v. Iowa Utilities Bd.,* have shaped the issues associated with the ability of carriers to substitute unbundled network elements for tariffed special access services. Although the Commission found in the *Local Competition First Report and Order* that the Act does not permit incumbent LECs to place restrictions on the use of unbundled network elements, it concluded that it was necessary to adopt a temporary mechanism to avoid a reduction in contributions to universal service prior to full implementation of access charge and universal service reform. It therefore allowed incumbent LECs to recover

[23] Supplemental Order, ¶ 4.

access fees from purchasers of unbundled network elements until June 30, 1997. Before this transition period expired, the Eighth Circuit stayed the Commission's unbundled network element pricing rules in October, 1996. Once these rules were stayed, it became uncertain whether or not unbundled network elements would continue to be priced at forward-looking cost and whether there would be a significant difference between tariffed access rates and unbundled network element rates. Then, in 1997, the Eighth Circuit also vacated sections 51.315(b)-(f) of the Commission's rules, which protected the right of requesting carriers to obtain combinations of unbundled network elements, such as loop-transport combinations. Vacatur of rule 51.315(b), in particular, precluded requesting carriers from obtaining access to such combinations without first incurring costly reconnection charges. In January 1999, the Supreme Court reinstated the Commission's pricing rules and rule 51.315(b). At the same time, however, it ordered the Commission to revisit its implementation of section 251(d)(2), which addresses the circumstances in which incumbent LECs must make unbundled network elements available to requesting carriers. We addressed this issue in the *Third Report and Order* and determined that incumbent LECs must unbundle loops and interoffice transport individually. The *Fourth FNPRM* asks about the legal and policy implications of allowing requesting carriers to substitute combinations of unbundled loop and transport network elements for the incumbent LECs' tariffed special access service.

5. We took several steps in the *Supplemental Order* to ensure that we sufficiently preserved the status quo pertaining to the special access issue while the *Fourth FNPRM* remains pending. Specifically, we concluded that until resolution of the *Fourth FNPRM,* which we said would occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loop and transport network elements. We explained that this constraint does not apply if an IXC uses such combinations to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer. In order to determine whether or not an IXC is using combinations of unbundled network elements to

> provide a significant amount of local exchange service, we stated that we would consider, for example, whether the IXC was providing at least one third of the customer's local traffic as described in a joint filing submitted by several parties. In addition, we stated that we would presume that the requesting carrier is providing a significant amount of local exchange service if it is providing all of the end user's local exchange service.

(citations omitted)(Qwest Post Hearing Brief, pp. 9-10).

Qwest argued that the FCC stated its position quite clearly in paragraph 28 of the Supplemental Order Clarification:

> We further reject the suggestion that we eliminate the prohibition on "commingling" (i.e. combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public notice that we will issue in early 2001.

(citations omitted)(Qwest Post Hearing Brief, p. 10.)

Qwest argues that the Supplemental Order Clarification recognized the existence of a "prohibition on commingling" that CLECs and IXCs sought to remove, and that if no prohibition existed before the Supplemental Order Clarification was issued, it could not be eliminated. (Qwest Post Hearing Brief, p. 10.) Qwest argues that these orders show the commingling ban was a long-standing doctrine at the FCC before the TRO removed the restrictions.

(Qwest Post Hearing Brief, p. 10.) Therefore, Qwest argues, the progression of the FCC's orders concerning the combination of UNEs with retail, finished access services (like the INS entrance facility in this case) reveals that the provisions of the ICA that allow LTDS to purchase dedicated transport were necessarily limited by the FCC's commingling prohibitions. (Qwest Post Hearing Brief, p. 11.)

Qwest argues that LTDS' argument that the commingling restriction only applies to the purchase of loops and loop-transport combinations, but not to the purchase of transport standing alone, is illogical and ignores the policy concerns addressed in the long line of FCC orders. (Qwest Post Hearing Brief, p. 11.) Qwest argues that it simply does not make sense that the FCC's prohibition on commingling applies if a loop is purchased, and applies if transport is added to the loop, but does not apply to transport standing alone. (Qwest Post Hearing Brief, p. 11.) Qwest argues the same commingling can occur with transport-only facilities and the facts of this case demonstrate that it does occur. (Qwest Post Hearing Brief, p. 11.)

Qwest argues the three rulings in the cases cited by LTDS are of limited value. (Qwest Post Hearing Brief, pp. 6, 7, 11.) Qwest states it is not aware of any rulings that analyze the question of whether a given interconnection agreement, interpreted in the light of the FCC commingling prohibition, permit a CLEC to obtain dedicated transport that is connected to a

retail, finished access facility like the INS entrance facility at issue in this case. (Qwest Post Hearing Brief, p. 6.)

Qwest argues the Washington Decision was made in the context of reviewing Qwest's section 271 application, the parties disputed the types of services or facilities to which UNEs could be connected without violating the commingling ban, and the ruling appears to be dicta without analysis or argument. (Qwest Post Hearing Brief, pp. 6-7). Qwest further argues the ruling does not resolve a dispute over what a particular contract does require, but only a policy choice as to what an SGAT should require. (Qwest Post Hearing Brief, p. 7.) In addition, Qwest cites to a similar case from Illinois,[24] in which the Commission discussed the question whether Level 3 should be given the ability to combine UNEs with tariffed services other than access services, concluded it could not, and stated:

> The plain meaning of this language . . . is that UNEs are not to be combined with tariffed services. Although the Supplemental Order Clarification discusses this issue in terms of EELs, Level 3 does not offer evidence that the principle set forth by the FCC should not apply to other UNEs.
>
> So too, we are directed to paragraph 28 of the Supplemental Order Clarification wherein the FCC states that '. . . the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services.' . . . Given

[24] Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, 00-0332, Illinois Commerce Commission (August 30, 2000)(Illinois Decision).

> this particular choice of words, the FCC appears to tell us that, as of now, UNEs may not be combined with tariffed services.

(Qwest Post Hearing Brief, p. 7.) However, Qwest argues that this case, like the Washington and Colorado cases, is of limited analytical value because the analysis is in the context of an interconnection agreement arbitration, not a breach of contract dispute. (Qwest Post Hearing Brief, p. 7.)

Qwest argues the WorldCom Decision is also of limited analytical value and is contradicted by the TRO, which it states examined the issue in depth. (Qwest Post Hearing Brief, pp. 11-12.) Qwest argues that in the WorldCom arbitration, the FCC was deciding between the parties' disputed proposed language for an interconnection agreement, not whether a purchase order should be approved pursuant to particular contract language. (Qwest Post Hearing Brief, p. 11.) Qwest argues the FCC in WorldCom provided little analysis of the commingling issue, and the issue does not appear central to the decision. (Qwest Post Hearing Brief, pp. 11-12.) In contrast, Qwest argues, in the TRO, the FCC analyzed the issue in depth, concluded the commingling restriction was no longer necessary, and defined commingling as:

> [T]he connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the

> combining of a UNE or UNE combination with one or more such wholesale services.[25]

(Qwest Post Hearing Brief, p. 12.)

Qwest argues that it and the FCC understood that commingling is not limited to loops and loop-transport combinations, but includes transport as well. (Qwest Post Hearing Brief, pp. 12-13). It argued that other carriers apparently understood the commingling prohibitions extended to transport, because as Mr. Morris testified, Qwest has not received orders from other carriers to connect dedicated transport to finished retail access services like the INS entrance facility. (Tr. 195; Qwest Post Hearing Brief, p. 13.) Qwest argues that LTDS and the Board should recognize this as well and conclude that Qwest properly rejected LTDS' order because it represented prohibited commingling.

Finally, Qwest argues that the Colorado Decision supports its position. (Qwest Post Hearing Brief, p. 13.) Qwest states the Colorado Commission concluded that the FCC's commingling prohibition did not extend beyond loop and loop-transport combinations, and indicated that if Qwest amended its SGAT to permit commingling of other UNEs, Qwest would receive a favorable section 271 recommendation relative to that issue. (Qwest Post Hearing Brief, p. 13.) Qwest argues the important point in the Colorado case is that, in order to allow commingling of UNEs other than loop and loop-transport

[25] TRO, ¶ 579.

combinations, Qwest had to amend its SGAT. (Qwest Post Hearing Brief, p. 13.) It argues the pre-existing SGAT language, which is similar to the language in the LTDS ICA, had to be amended in order to permit the purchase of UNEs connected to finished retail access services. (Qwest Post Hearing Brief, p. 13.) Qwest argues that the language in the Colorado SGAT amendment demonstrates the language that would be required in this case to permit LTDS to connect dedicated transport to the INS facility, and the language in the LTDS ICA fails to overcome the prohibition. (Qwest Post Hearing Brief, pp. 13-14).

Discussion

As the parties agree, the LTDS/Qwest ICA is a contract governing the interconnection relationship between the two, and if there is a conflict between the ICA and Qwest's PCAT,[26] the ICA controls. (LTDS Prehearing Brief, pp. 2, 7; Qwest Post Hearing Brief, p. 4.) On May 23, 2003, the terms of the LTDS/Qwest ICA itself described the dedicated transport LTDS ordered in general terms, and would appear to allow LTDS to obtain the four DS-1s it ordered from Qwest. (ICA Scope of Agreement, Section 37, Attachment 3, sections 1, 9.1). However, the ICA itself is silent as to whether collocation is required at either end of the dedicated transport, and is silent as to whether

[26] Qwest's PCAT is the catalog that describes the products other telecommunications carriers may order from Qwest in greater detail than the ICA. (Ex 200; Qwest Post Hearing Brief, p. 3.)

the dedicated transport UNE may be connected to a "finished" or "tariffed" service. (ICA; Tr. 98-99).

The requirement for collocation at each end of dedicated transport appears in Qwest's PCAT, not in the ICA. (Ex 200.) Qwest staff apparently referred to the PCAT requirement for collocation to deny the order. Ordinarily, this would not be an unreasonable position for staff to take, since the PCAT describes UNEs and ordering procedures in more detail than the ICA. However, since there is no requirement for collocation in the ICA itself, and the ICA governs in case of a conflict, Qwest cannot rely on the PCAT requirement for collocation alone to justify its denial of the order. Qwest argues there is no conflict between the ICA and the PCAT because the PCAT requirement for collocation was consistent with FCC orders prohibiting commingling, and since the ICA states it is subject to federal law, the PCAT's requirement of collocation is consistent with the ICA as interpreted consistent with the FCC orders. (Qwest Post Hearing Brief, p. 4.)

Qwest is correct that the ICA is subject to federal and state law and must be interpreted in the context of this law. However, although the law in effect in May 2003 was somewhat unclear, the undersigned finds LTDS' arguments to be more persuasive and finds that the FCC's commingling restriction did not cover the situation at issue in this case. Qwest's

interpretation of the commingling prohibition was overly broad and commingling did not prohibit LTDS' order.

First, the FCC discussed the commingling restriction primarily in the context of its concern that interexchange carriers would use UNEs to provide exchange access service, not local service. First Report and Order, ¶ 717; Supplemental Order Clarification, ¶¶ 2, 5, 28. *See also* Competitive Telecommunications Assoc. v. FCC, 359 F.3d 8 (D.C.Cir. 2002). The concerns were apparently that IXCs would not pay appropriate access fees to ILECs and contributions to the universal service fund could suffer until the FCC adopted access and universal service reform. First Report and Order, ¶¶ 717, 720; Third Report and Order, ¶¶ 483 – 489; Supplemental Order, ¶¶ 2–4; Supplemental Order Clarification, ¶¶ 2, 4, 7, 28; Competitive Telecommunications Assoc. v. FCC, 359 F.3d 8, 15 (D.C. Cir. 2002). *See also,* TRO, ¶ 583.

LTDS is not an interexchange carrier and did not plan to provide interexchange service. However, Qwest argued this case is the same, because LTDS would send a significant amount of internet-bound traffic from Burlington to Fairfield over the ordered DS-1s, across exchange and LATA boundaries, that never returned to Burlington, and does send such traffic under the alternative transport it obtained. (Qwest Post Hearing Brief, p. 8.) Although Qwest presented evidence of traffic imbalance and LTDS' use of

facilities to send data traffic to the internet, the evidence presented by LTDS is persuasive that, when it placed the order in May 2003, LTDS intended to use the four DS-1s it ordered to provide a combination of local voice service and high speed data service to customers in Burlington. (Ex 110, 111, 204, 205, 206, 209; Tr. 40-43, 55-56, 58, 60-62, 67-68, 76-81, 83-85, 147-150, 172-175, 181-184, 212-218, 221-232, 246-248, 262-269, 316-317) In addition, the ICA allows CLECs to use UNEs to offer voice and data services. (ICA, Scope of Agreement, Part A).

In its discussions of the issue, the FCC stated the commingling restriction does not apply when an IXC provides a significant amount of local exchange service to a particular customer, and it would presume the requesting carrier was providing a significant amount of local exchange service if it provided all of the end user's local exchange service. Supplemental Order, ¶ 5, note 9; Supplemental Order Clarification, ¶¶ 2, 3, 5, 22, 29. It does not appear that the commingling restriction was intended to restrict the situation at issue in this case, where LTDS intended to use the ordered DS-1s to provide a combination of local voice service and high speed data service to customers in Burlington.

Second, although there is some conflict in the FCC's language discussing commingling and decisions discussing the restriction, the greater

weight of authority is that as of May 2003, the commingling restriction was limited to loops and loop-transport combinations.

As the FCC discussed in the First Report and Order, section 251(c)(3) of the Telecommunications Act requires LECs to provide nondiscriminatory access to UNES at any technically feasible point, and section 251(d)(2) provides that the Commission is to consider whether access to proprietary network elements is necessary and whether the failure to provide access to such network elements would impair the CLEC's ability to provide services. First Report and Order, ¶¶ 278 and 279. The FCC concluded that section 251(c)(3) permitted IXCs and all other requesting carriers to purchase UNEs for the purpose of offering exchange access services or for the purpose of providing exchange access services to themselves in order to provide interexchange services to customers. First Report and Order, ¶ 356. The FCC did not restrict IXCs' use of UNEs in the First Report and Order. First Report and Order, ¶¶ 717, 720.

In the Third Report and Order, the FCC stated that a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the ILEC's wire center on an unrestricted basis at UNE prices. Third Report and Order, ¶ 486. The FCC noted this could create a problem if CLECs used UNEs to provide interexchange services without having to pay access charges to the ILEC and, therefore, temporarily allowed ILECs to

assess access charges, but did not place a restriction on the use of UNEs. Third Report and Order, ¶¶ 483, 486, 489; United States Telecom Assoc. v. FCC, 359 F.3d. 554 (D.C. Cir. 2004.)

The FCC first placed a restriction on the use of UNEs in 1999 in the Supplemental Order, but the restriction was limited in scope and was temporary. Supplemental Order, ¶¶ 4, 5; United States Telecom Assoc. v. FCC, 359 F.3d. 554 (D.C. Cir. 2004.) The FCC stated it would "now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements of this Order." Supplemental Order, ¶ 4.

The following year, in 2000, in the Supplemental Order Clarification in ¶ 28, the FCC used language that could be interpreted to support both LTDS' and Qwest's interpretations of the commingling restriction. On the one hand, the FCC stated it would not eliminate the prohibition on commingling, "*i.e.* combining loops or loop-transport combinations with tariffed special access services." On the other hand, it also stated: "We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services."

This led to differing interpretations of the scope of the commingling restriction by state utility commissions. In 2000, the Illinois Commerce

Commission interpreted the Supplemental Order Clarification to mean that the restriction was not limited to loop-transport combinations, and stated that "the FCC appears to tell us that, as of now, UNEs may not be combined with tariffed services." Illinois Decision, ¶ 18. In July 2001, an administrative law judge for the Washington Utilities and Transportation Commission interpreted the Supplemental Order Clarification to mean that the only UNE combinations that are prohibited from combination with other services are loops or loop-transport combinations with tariffed special access services.[27] Washington Decision. In August 2001, the Colorado Public Utilities Commission interpreted the Supplemental Order Clarification to mean that the restriction is limited to commingling between loop and loop-transport combinations and tariffed special access services. Colorado Decision, Section G.[28]

Then, in July 2002 in the WorldCom Decision, the FCC stated it disagreed that proposed language for an interconnection agreement was impermissible because it allowed commingling of UNEs with a special access

[27] The Washington decision also stated that Qwest's proposed prohibition on connecting UNEs to "finished services" did not comport with the Supplemental Order Clarification because the SGAT's definition of "finished services" included more than "tariffed special access services." Washington Decision, p. 25.

[28] Qwest's argument that the Colorado Decision supports its position because the Commission required Qwest's SGAT to affirmatively state UNEs could be directly connected to finished services unless expressly prohibited by existing rules, and therefore, the LTDS/Qwest ICA must also contain such language before such connection is allowed is unpersuasive. The Colorado Commission did not say, that without such an affirmative statement, UNEs could not be directly connected to finished services.

service.[29] WorldCom Decision, ¶ 510. The FCC stated: "While the Commission's rules provide such a restriction with respect to EELs [loop-transport combinations], this restriction does not apply generally to all UNEs." WorldCom Decision, ¶ 510. The FCC also stated there was no requirement that a competitive LEC collocate at the incumbent LEC's wire center or other facility in order to purchase UNE dedicated transport. WorldCom Decision, ¶ 217.

Qwest argues these decisions are of limited analytical value because they do not resolve a dispute over what any particular contract does require, but only a policy choice as to what an SGAT or interconnection agreement should require, they were not central to the primary issues in the cases, and they were made with little analysis. (Qwest Post Hearing Brief, pp. 7, 12) These arguments are unpersuasive, because the decisions were clearly interpreting the meaning and scope of the commingling restriction, which is the issue before us in this case. Once the FCC issued the decision in the WorldCom case, its position was clear that the commingling restriction was limited to loops and loop-transport combinations. WorldCom Decision, ¶ 510.

In October 2002, the D.C. Circuit Court of Appeals stated that, on the limited record in the case, it was unable to say that the commingling restriction was arbitrary and capricious. Competitive Telecommunications

[29] The decision was authored by the Chief of the Wireline Competition Bureau acting through authority expressly delegated by the F.C.C. WorldCom Decision, ¶ 1.

Assoc. v. FCC, 309 F.3d 8, 18 (D.C. Cir. 2002.) The Court stated the commingling restriction essentially did not allow loop-transport combinations taken as UNEs to be connected to the ILEC's tariffed services, although it was not considering the question of whether the restriction could also include transport without loops. *Id.* at p. 17.

Qwest argues that it is illogical, and ignores the policy concerns, to prohibit commingling for the purchase of loops and loop-transport combinations, but not to the purchase of transport standing alone. (Qwest Post Hearing Brief, p. 11.) However, this is how the FCC limited the restriction in the WorldCom decision, and as discussed below, it makes sense that the FCC crafted a narrow restriction when the restriction was not contained in the Telecommunications Act.

Qwest also argues the WorldCom Decision is contradicted by the TRO. (Qwest Post Hearing Brief, p. 11.) In the TRO, which was released in October 2003, after the rejection of LTDS' order, the FCC stated it eliminated the commingling restriction "that the Commission adopted as part of the temporary constraints in the *Supplemental Order Clarification* and applied to stand-alone loops and EELs." TRO, ¶ 579. It stated it was modifying its rules to "permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.* switched and special access services offered pursuant to tariff)." TRO, ¶ 579. The FCC then stated, "By commingling, we mean the

connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." TRO, ¶ 579. The FCC concluded that the Telecommunications Act did not prohibit the commingling of UNEs and wholesale services, including interstate access services, and section 251(c)(3) gave it the authority to adopt rules to permit commingling. TRO, ¶ 581.

The FCC stated that the commingling restriction put CLECs at an unreasonable competitive disadvantage by forcing them to either operate two functionally equivalent networks, one for local services and one for long distance and other services, or to choose between using UNEs and using more expensive special access services to serve their customers. TRO, ¶ 581. The FCC found that the commingling restriction constituted an "unjust and unreasonable practice" under section 201 and an "undue and unreasonable prejudice or advantage" under section 202 of the Telecommunications Act. TRO, ¶ 581. It also stated the commingling restriction was inconsistent with the nondiscrimination requirement in section 251(c)(3) because ILECs place no such restrictions on themselves to provide services to customers. TRO, ¶ 581.

The TRO is not helpful to Qwest. In the first place, the law in place at the time Qwest rejected the order in May 2003 was the FCC's statement in the WorldCom Decision that the commingling rules applied to EELs but not all UNEs. WorldCom Decision, ¶ 510. The TRO was not released until October 2003. In addition, in the TRO, the FCC stated that in the Supplemental Order Clarification, it applied the commingling restriction to stand-alone loops and EELs. TRO, ¶ 579. The FCC defined commingling more broadly only when it described what the rules would allow in the future. It is not a conflict that the FCC described what had been prohibited in the past more narrowly and described what it would permit requesting carriers to do in the future more broadly. Given that the Telecommunications Act does not contain the commingling restriction, and that the restriction was intended to be a temporary solution until the FCC addressed universal service and access charge reform, it makes sense that the commingling restriction would be limited to a specific, narrow exception to the statute when it was in effect.

There is one final reason it is unclear the commingling restriction applied to this case. LTDS proposed to connect the DS-1s it ordered from Qwest with four DS-1s it leased from INS in Davenport. (LTDS Brief, p. 8.) The four INS DS-1s are part of a larger OC-48 (entrance facility) INS leased from Qwest as a tariffed product. (LTDS Prehearing Brief, pp. 7,8; Qwest Prehearing Brief, pp. 2,3.)

Qwest argues that since INS leased the entrance facility from Qwest's tariffs, it remained a tariffed or finished service even when LTDS leased it from INS, and Qwest argues the primary lessee of the facility is irrelevant for purposes of commingling. (Qwest Prehearing Brief, pp. 2, 3; Tr. 250-51.) Qwest further argues commingling constitutes the connection of a UNE to a non-UNE regardless of the carriers involved. (Qwest Prehearing Brief, p. 3.) Qwest also apparently holds the position that the four DS-1s LTDS leased from INS are also a finished service because they are a part of the larger OC-48 INS leased from Qwest as a tariffed product, and it does not matter that the product LTDS leased from INS is not the same product that INS leased from Qwest. Qwest provided no legal authority to support these positions.

LTDS argues the DS-1s it ordered from Qwest are not being connected to a tariffed product, it has not purchased any relevant part of its path from a tariff, and LTDS has a contract with INS for the facilities. (LTDS Prehearing Brief, pp. 7, 8.) LTDS argues Qwest is seeking to impute INS' lease of a tariffed product to LTDS, which should not be allowed, as the product INS leases from Qwest is not the same product LTDS leases from INS. (LTDS Prehearing Brief, p. 8.)

In the broad definition of commingling in the TRO, the FCC states it is the connecting or combining of a UNE to one or more facilities or services the

requesting carrier has obtained at wholesale from an ILEC pursuant to any method other than unbundling. TRO, ¶ 579. This contemplates that the requesting carrier has obtained both facilities from the ILEC. The FCC orders issued prior to the TRO regarding commingling and in effect in May 2003 do not indicate one way or the other whether both the loop or loop-transport combination and the tariffed special access service must be obtained directly from the ILEC for the commingling restriction to apply. Since Qwest has the burden of proof on this issue and it failed to provide any legal authority or reasoning to support its positions, the undersigned finds in favor of LTDS on this issue. It is not clear that the commingling restriction would apply in this situation, because LTDS leased the facility from INS, not Qwest, and because the facility LTDS leased from INS is only a part of the facility INS leased from Qwest.

For the above reasons, the undersigned finds that the commingling restriction did not prohibit LTDS from obtaining the four DS-1s it ordered from Qwest in May 2003. Qwest was mistaken when it denied the order based on the commingling restriction.

5. The Remedy

LTDS argues that because Qwest violated the ICA, Qwest should compensate LTDS, and in particular, Qwest should be assessed the credits provided for in the ICA for failure to meet provisioning intervals. (Tr. 51-53;

LTDS Prehearing Brief pp. 14-15; LTDS Post Hearing Brief, pp. 13-18; LTDS Reply Brief, pp. 3-8.) LTDS argues that the LTDS/Qwest ICA, Attachment 11, Appendix A, provides for a credit of $2,500 per day, plus waiver of any applicable installation or service ordering charges, for delays in filling orders for network elements not specific to an individual end use customer. (Tr. 51; Ex 107; LTDS Pre Hearing Brief, p. 14; LTDS Post Hearing Brief, p. 13.) Mr. Magill testified LTDS' order was not specific to an individual customer and was vital to LTDS' capacity to provide local telephone service in Burlington. (Tr. 51.) He testified that each day of delay cost LTDS the continuing cost of its investment in Burlington, including the cost of circuits rented from INS between Davenport and Fairfield. (Tr. 51.) He testified that each day of delay was critical to its ability to compete effectively in Burlington. (Tr. 51.) Mr. Magill testified that at the time it placed the order, LTDS was capable of delivering broadband DSL, a product not yet offered by Qwest in Burlington, and had it promptly obtained the DS-1s it ordered, it would have been the first telephone company in Burlington to offer DSL packaged with telephone service. (Tr. 51-52.) Mr. Magill testified this would have greatly supported its sales efforts. (Tr. 52.) However, Mr. Magill testified, Qwest was able to introduce DSL into Burlington during the time LTDS' order was held up. (Tr. 52.) Mr. Magill testified this has severely frustrated LTDS' revenue expectations in Burlington. (Tr. 52.)

LTDS argues that it should receive a credit of $2,500 per day from June 4, 2003, the last day fulfillment of its order was due, to November 14, 2003, when LTDS' alternate service was operational. (Tr. 52; LTDS Prehearing Brief, p. 14.) LTDS argues it is, therefore, entitled to a credit of a total of $410,000. (Tr. 52.)

LTDS argues that Qwest's refusal to follow the ICA cost LTDS six months' lost revenue from voice service in Burlington and the payments to INS for the Davenport-Fairfield portion of the call path, required LTDS to piece together a new path at greater acquisition cost, and required LTDS to expend legal resources to obtain what it argues should have been a simple order under the ICA. (Tr. 52; 125-126; LTDS Post Hearing Brief, p. 16-18.) Mr. Magill testified it was his belief these costs and lost revenues were likely higher than the "liquidated damages" under the ICA. (Tr. 52.)

LTDS disputes Qwest's argument that the credit provisions do not apply because the order was rejected rather than any time commitment provision being missed. (LTDS Prehearing Brief, p. 14; Post Hearing Brief, p. 13-14.) LTDS argues the Board should not recognize such a semantic distinction, and the argument would allow Qwest to wholly eliminate the performance standards and the important incentives they seek to provide. (LTDS Prehearing Brief, p. 14.)

LTDS argues there is no separate entry in the "Per Occurrence Credits" in Attachment 11, Appendix A of the ICA for wrongfully rejected orders. (LTDS Post Hearing Brief, p. 13.) It argues, as a result, Qwest's position results in the absurd outcome that if Qwest misses a provisioning date by a few days and causes a competitor a slight delay, it faces substantial damages, but if it wrongfully rejects an order and delays a competitor by months or years causing much more harm to the competitor, Qwest pays nothing. (LTDS Post Hearing Brief, p. 14.) LTDS argues this cannot be the correct result. (LTDS Post Hearing Brief, p. 14.)

LTDS argues that Qwest could reject orders any time it had more orders than staff resources, therefore, allowing Qwest to avoid ever having to issue credits and rewriting the contract, which would be disastrous for competition. (LTDS Prehearing Brief, p. 14; Post Hearing Brief, p. 14.) LTDS argues this risk is exacerbated by Qwest seeking the unfettered ability to unilaterally decide when to reject an order with no risk of consequences. (LTDS Prehearing Brief, p. 14.) LTDS argues Qwest seeks to have LTDS bear all the risk for Qwest's unlawful decision to reject the order, which is more damaging to LTDS than had the provisioning time been missed by a few days. (LTDS Prehearing Brief, p. 14.) LTDS argues that Qwest, not LTDS, should bear the risk of its choice to reject the order. (LTDS Prehearing Brief, p. 15.) LTDS argues there is every incentive for Qwest to err on the side of

rejecting orders and force the CLEC to expend resources to "sort it out" while the CLEC is unable to compete, thereby protecting its near-monopoly status. (LTDS Prehearing Brief, p. 15.)

LTDS argues Qwest could have easily provided the DS-1s it ordered to ensure LTDS was not harmed and then challenged whether collocation was required. (LTDS Prehearing Brief, p. 15.) It argues that the alternatives offered by Qwest, collocation and private lines, were not acceptable alternatives and there is no alternative that makes LTDS truly whole. (LTDS Post Hearing Brief, p. 14.) LTDS also argues the cost estimates for the alternatives are understated, and that the additional collocation charges are inefficient or non-economic, because they add no functional advantage and result in redundant costs. (LTDS Post Hearing Brief, p. 14-16; Ex 101, 113.)

LTDS argues even the alternative solution it chose did not truly remedy Qwest's wrongful denial of the order. (LTDS Post Hearing Brief, p. 16.) It argues any damages measured by alternative solutions ignore the adverse impact on LTDS' ability to compete in Burlington. (Tr. 125-126; LTDS Post Hearing Brief, p. 16-18.) It argues the Board approved the $2,500 per day credit as an estimate that includes not only an approximated value for the actual losses of a CLEC, but also an amount that attempts to provide compensation for the CLEC's indeterminable losses, as well as some

measure to prevent Qwest from gaining an unfair benefit and to deter Qwest from interfering with competitors. (LTDS Post Hearing Brief, p. 18.)

LTDS argues the ICA is a contract, Qwest willfully and intentionally failed to fulfill the order, the contract provides penalties for breaches of the contract terms like the breach committed by Qwest, and it is entitled to the credits contemplated by the ICA. (LTDS Prehearing Brief, p. 15; LTDS Post Hearing Brief, p. 18.) It argues that Qwest is wrong when it suggests that it should have no consequences when it ignored the law and kept LTDS out of Burlington. (LTDS Reply Brief, p. 10.) LTDS argues no amount of money can replace the fact it could not be the first in Burlington to offer a voice/DSL bundle, but that does not mean Qwest should not have to provide it the credits provided for in the contract. (LTDS Reply Brief, pp. 11-12.)

LTDS argues it is not attempting to obtain a windfall, it suggested that Qwest provide the ordered DS-1s and the parties could go to the Board for resolution and "true up" the difference if needed, and this would have mitigated LTDS' damages. (LTDS Reply Brief, pp. 10-11.) LTDS argues it should not have had to incur expense for Qwest's alternative solutions to mitigate its damages. (LTDS Reply Brief, p. 11.) It argues it requested arbitration, which Qwest rejected, and it is laughable to suggest that LTDS did nothing to mitigate its damages. (LTDS Reply Brief, p. 11.)

Qwest argues LTDS is not entitled to damages for failure to receive a service to which it was not entitled, and that it rejected the order, so it cannot be liable for a "service order provisioning commitment missed" under ICA Attachment 11, Appendix A. (Tr. 160, 178.) Mr. Morris testified that when Qwest rejected the order, it explained the problems with the order to LTDS and offered relatively inexpensive alternative products so LTDS could accomplish its network requirements. (Tr. 160; Ex 201, 202; Supplemental Testimony of Mr. Morris, pp. 3-6; Ex. 210A, 210B, 211B.) Mr. Morris testified that these alternatives would have cost LTDS about $1,000 per month more than the four DS-1s it ordered. (Tr. 160.) Qwest presented evidence that the ICDF collocation alternative it offered would have cost LTDS $11,304.90 the first year, although $9,133.92 of that cost was for the four DS-1s LTDS ordered, and $155.66 is the service order charge. (Supplemental Testimony of Mr. Morris, pp. 5-6; Ex. 211B). Qwest argues at most, LTDS would be entitled to the difference between the charge for the four DS-1s and the charge associated with the alternative products Qwest proposed, or about $2,000. (Qwest Prehearing Brief, p. 8; Supplemental Testimony of Mr. Morris, pp. 5-6; Ex 211B; Qwest Post Hearing Brief, p. 18; Qwest Post Hearing Reply Brief, p. 9.) Qwest argues that LTDS rejected the offered lower-cost alternatives and then constructed a work-around solution it claims

cost more and thereby failed to mitigate its damages. (Qwest Prehearing Brief, p. 8; Qwest Post Hearing Brief, pp. 6, 21; Reply Brief, pp. 6-8.)

Qwest argues that LTDS admitted Qwest rejected the order from the beginning and never made a service order provisioning commitment with respect to the order submitted on May 22, 2003. (Tr. 74-75; Qwest Post Hearing Brief, p. 2.) Qwest argues that to twist the rejection of LTDS' order into a "service order provisioning commitment" is a near-frivolous torture of the ICA's language. (Qwest Post Hearing Brief, p. 2.) Mr. Morris testified that even if Qwest were wrong in not fulfilling the order, this was a rejected order, not a missed commitment, and according to the terms of the ICA, Qwest's service order provisioning measure is predicated on a commitment being missed. (Tr. 178.) He testified that since the order was rejected, no commitment was made, and the missed commitment provision is inapplicable to a rejected order. (Tr. 178.)

Qwest argues LTDS' selected remedy impermissibly distorts the ICA's language and purposes. (Qwest Post Hearing Brief, p. 19.) It argues in order to give effect to all the words "Service Order Provisioning Commitment Missed," there must be a service order, which there was in this case, and a provisioning commitment both made and missed that relates to the service order, which is not present in this case. (Qwest Post Hearing Brief, p. 19.)

Qwest argues it never committed to anything but flatly rejected the order. (Qwest Post Hearing Brief, p. 19; Reply Brief, p. 3.)

Qwest further argues that to give effect to all the terms of the penalty provision, the term "Provisioning Commitment" necessarily modifies and relates to a "Service Order." (Qwest Post Hearing Brief, p. 19.) Qwest argues that LTDS contends that Qwest's commitment was made in connection with the ICA generally, but admits there was no commitment made in connection with the service order except to reject it. (Qwest Post Hearing Brief, p. 19.) Therefore, Qwest argues, LTDS' argument reads the language "Service Order" out of the ICA entirely. (Qwest Post Hearing Brief, p. 19.) Qwest argues the logical result of LTDS' position is to replace the words "Service Order" with "Interconnection Agreement," such that Qwest's alleged violation is an "Interconnection Agreement Provisioning Commitment Missed." (Qwest Post Hearing Brief, pp. 19-20.) Qwest argues such an interpretation of the ICA cannot stand. (Qwest Post Hearing Brief, p. 20.)

Qwest further argues that LTDS' position would rob Qwest of the ability to raise bona fide disputes under the ICA, because it would be at risk of a $2,500 per day penalty every time it contended a CLEC was not entitled to a particular UNE pursuant to the contract and federal law. (Qwest Post Hearing Brief, p. 20.) Qwest argues this is not the purpose of the ICA nor the penalty provision at issue in the case. (Qwest Post Hearing Brief, p. 20.)

Qwest further argues Attachment 11 of the ICA relates to service quality standards, not dispute resolution provisions. (Qwest Post Hearing Brief, p. 20.) In support, it states that Section 3.1 of Attachment 11 provides:

> The ILEC will credit the CLEC the amounts, as referenced in this Attachment, against charges due from the CLEC to the ILEC for all Local Services, Network Elements or Combinations provided to the CLEC for failures to meet the service quality standards specifying timeliness and accuracy required by this Agreement for pre-order activities, order/provisioning, maintenance/repair, billing and network quality of such Local Services, Network Elements or Combinations.

Qwest argues the remarks at the top of the Attachment 11, Appendix A table that set out the service quality credits describe the credits as relating to "selected quality measures." (Ex 107; Qwest Post Hearing Brief, p. 20.) Qwest argues the other provisions in the table relate to service quality issues. (Qwest Post Hearing Brief, p. 20.) It argues that taken together, these provisions indicate the intent of the "Service Order Provisioning Commitment Missed" credit is to provide Qwest a significant incentive to provision an order when it says it will do so. (Qwest Post Hearing Brief, pp. 20-21.) Qwest argues applying the $2,500 per day credit in this case fails to meet this objective, would penalize Qwest for asserting its contractual rights, and would create incentives for CLECs to "push the envelope of their contracts and delay resolution of disputes." (Qwest Post Hearing Brief, p. 21.) Qwest

argues that LTDS' tortured interpretation is bad logic, bad law, and bad policy. (Qwest Post Hearing Brief, p. 21.)

Qwest argues that the only remedy LTDS seeks is the credit under the "Service Order Provisioning Commitment Missed" section of the ICA. (Tr. 140-141; Qwest Post Hearing Brief, p. 4-5.) It argues that LTDS does not seek common law or contract remedies and LTDS' evidence does not support them. (Tr. 15, 127; Qwest Post Hearing Brief, p. 5; Qwest Reply Brief, pp. 5-6; LTDS Complaint, p. 7.) Qwest asserts that Sections 8 and 10 of the ICA expressly permit LTDS to seek common law and contractual remedies in addition to the credits for performance standards failures contained in Attachment 11. (Qwest Post Hearing Brief, p. 6; Reply Brief, p. 4.) It argues that LTDS made a strategic choice to reject low-cost alternative solutions Qwest offered and to limit the remedies it pleaded and proved. (Qwest Post Hearing Brief, p. 4.) Therefore, Qwest argues, even if Qwest is found to be wrong when it denied the order, LTDS is entitled to no relief. (Qwest Post Hearing Brief, p. 4.) Qwest argues this result is due to LTDS' unilateral, strategic choice not to plead, seek, or prove traditional breach of contract damage theories such as lost revenues, profit potential, or the cost of obtaining substitute performance, and limited itself to the potentially harsh result. (Qwest Reply Brief, pp. 3-6.) Qwest further asserts if LTDS had sought breach of contract remedies it would have been entitled to traditional

defenses to such claims such as failure to mitigate. (Qwest Reply Brief, p. 4, 6.)

Discussion

The ICA is a contract. The plain meaning of the contract is that credits are due if there is a service order provisioning commitment missed. In this case, Qwest never committed to provision the order. Therefore, there was no missed commitment. The Service Order Provisioning Commitment Missed section in Attachment 11, Appendix A of the contract does not apply to this case.

LTDS is incorrect that the Service Order Provisioning Commitment Missed credits provide it with the only remedy in the contract. If the specific items listed do not apply, Section 10 of the ICA states that the remedies provided in the ICA are cumulative, not intended to be exclusive, and in addition to any remedies that may be available at law or in equity. (ICA, ¶¶ 10.1, 10.3.) The ICA states the "parties agree that the credits for performance standards failures contained in Attachment 11 are not inconsistent with any other remedy and are intended only to compensate the CLEC, partially and immediately, for the loss in value to the CLEC for the ILEC failure to meet Performance Standards." (ICA, ¶ 10.3.) The ICA is clear that the credit remedy is not exclusive and common law contractual damages are available to LTDS if Qwest breaches the contract. (ICA, Section 10.)

In this case, if it had pled, proven, and argued for common law contractual damages, LTDS would have been entitled to them. The evidence shows Qwest erred in relying on the commingling prohibition to reject the order and, it therefore, breached the ICA. However, the evidence does not support a finding that Qwest willfully rejected the order knowing its commingling theory was wrong as alleged by LTDS. The law regarding the commingling restriction, as it applied to this particular contract and purchase order, was not entirely clear. The evidence shows the parties simply had a differing interpretation of how the law applied.

Despite being given the opportunity to do so, LTDS did not provide an alternative theory of recovery. LTDS took the position that the credits applied, and it did not claim common law contractual damages. Although LTDS argued policy reasons why the Board should award it credits, the terms of the contract simply do not apply. Its policy arguments would have been relevant to an argument why it should be given contractual damages under Section 10 of the ICA. There is nothing in the contract that indicates the credit remedy should be applied more broadly than its terms state for policy reasons. Rather, the credit provisions are narrowly drawn to apply to specific situations, and common law contractual damages remedies are available for other situations. Therefore, although the result appears harsh, LTDS is not entitled to a monetary recovery.

The undersigned notes that both the commingling law and the parties' ICA have changed since May 2003, and the parties apparently agree that if and when LTDS decides it wishes to obtain the four DS-1s from Qwest, it is entitled to them. Therefore, there appears no need to order Qwest to fulfill LTDS' order in this decision.

FINDINGS OF FACT

1. The parties' stipulated facts and agreed-on additional facts stated in the body of this order are adopted as findings of fact. (Joint Statement of Factual Stipulations; Statement of Additional Facts and Issues; Tr. 12-14.)

2. The Board issued a certificate to LTDS to provide local telecommunications services, and after review, determined not to revoke the certificate. Docket No. TCU-01-13, Final Decision and Order, issued January 9, 2002.

3. Although Qwest presented evidence of traffic imbalance and LTDS' use of facilities to send data traffic to the internet, the evidence presented by LTDS is persuasive that, when it placed the order in May 2003, LTDS intended to use the four DS-1s it ordered to provide a combination of local voice service and high speed data service to customers in Burlington. (Ex 110, 111, 204, 205, 206, 209; Tr. 40-43, 55-56, 58, 60-62, 67-68, 76-81,

83-85, 147-150, 172-175, 181-184, 212-218, 221-232, 246-248, 262-269, 316-317.)

4. The LTDS/Qwest ICA allows LTDS to use UNEs, including the dedicated transport it ordered, to offer voice and data services. (ICA, Scope of Agreement, Part A).

5. The UNEs ordered in this case were dedicated transport and did not include loops or a loop-transport combination. (Tr. 41; Ex. 104.)

6. The Service Order Provisioning Commitment Missed section of the ICA does not apply to this case, and LTDS is not entitled to the credits it claimed pursuant to that section. (ICA, Attachment 11, Appendix A.)

CONCLUSIONS OF LAW

1. Qwest cannot ignore the certificate to provide local telecommunications service the Board issued to LTDS and cannot use beliefs it may hold regarding the legitimacy of LTDS' CLEC status or LTDS' intended use of requested facilities as a basis for rejection of an order. Iowa Code §§ 476.29, 476.95; Supplemental Order, ¶ 5, note 9; Supplemental Order Clarification, ¶¶ 2, 3, 5, 22, 29-31.

2. As of May 2003, the FCC commingling restriction did not apply generally to all UNEs, but was limited to loops and loop-transport combinations. Supplemental Order, ¶¶ 4, 5; Supplemental Order Clarification, ¶ 28; WorldCom Decision, ¶ 510; TRO, ¶ 579.

3. The commingling restriction did not prohibit LTDS from obtaining the four DS-1s it ordered from Qwest in May 2003. Qwest was mistaken when it denied the order based on the commingling restriction. Supplemental Order, ¶¶ 4, 5; Supplemental Order Clarification, ¶ 28; WorldCom Decision, ¶ 510; TRO, ¶ 579.

4. Since LTDS limited its theory of recovery to a claim for credits under the Service Order Provisioning Commitment Missed section of the ICA and did not plead, prove, nor request a common law contractual damages remedy, it is not entitled to a contractual damages remedy under Section 10 of the ICA.

IT IS THEREFORE ORDERED:

1. Since the commingling law and the ICA have changed since May 2003, and the parties agree that if and when LTDS decides it wishes to obtain the four DS-1s from Qwest, it is entitled to them, there is no need to order Qwest to fulfill LTDS' order in this decision.

2. The Board, not the undersigned, will determine the assessment of costs of this proceeding.

3. Arguments in the briefs not addressed specifically in this order are denied, either as not supported by the evidence, or as not being of sufficient persuasiveness to warrant comment.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 22nd day of October, 2004.